

Delegated Powers and Law Reform Committee  
Tuesday, 20<sup>th</sup> May 2025  
17<sup>th</sup> Meeting, 2025 (Session 6)

## Instrument Responses

### Deposit and Return Scheme for Scotland Amendment Regulations 2025 (SSI 2025/Draft)

On 9 May 2025 the Committee's legal advisers asked:

"In the questions below:

- "the 2020 Regulations" means the Deposit and Return Scheme for Scotland Regulations 2020 (SSI 2020/154).
- "the Order" means the draft Deposit and Return Scheme for Scotland (Designation of Scheme Administrator) Order 2025 which was laid at the same time as this instrument.

#### Questions

1. In the questions on the Order which were also sent today, question 2 relates also to this instrument.
2. Should the following definitions (inserted by regulation 4(1) of this instrument into the interpretation provision in regulation 2(1) of the 2020 Regulations) be inserted in alphabetical order?
  - "returnable packaging"
  - 1. "sum equal to the deposit".
3. In new regulation 16A(3) (inserted by regulation 15 of the instrument) is there an error in the wording that provides that the scheme administrator must pay hospitality retailers from whom it collects scheme packaging "the total amount of sums equal to the deposits" which have been paid by hospitality retailers in respect of the collected scheme packaging? This contrasts with the equivalent wording in paragraphs 2(a) and (4).
4. Regulation 17 of the instrument amends regulation 20 (return points) of the 2020 Regulations. Regulation 17(1)(f) omits paragraph (5) of regulation 20, which was inserted by SSI 2023/210, but the instrument does not remove the reference to paragraph (5) which SSI 2023/210 inserts into the opening words of regulation 20(2). Is this an oversight?
5. New regulations 20ZB and 20ZC of the 2020 Regulations (inserted by regulation 18 of the instrument) provide that they apply where a person applies for an exemption under new regulation 20ZA, but regulation 20ZA provides for applications for registration rather than exemption.
  1. Are the references to regulation 20ZA incorrect?

2. Consequently, should new regulations 20ZB and 20ZC have been inserted after regulation 24 (application for exemption of a return point) rather than after regulation 20 (return points), since they concern what happens after an application for an exemption has been made?
6. New schedules 1A, 1B and 1C provide:  
“Where the [body] is a company, the company registration number as kept by Companies House, if applicable.”  
Would it be more in line with standard drafting practice to stop the sentence after “number”? “If applicable” is redundant if the body is a company, and the company registration number is not normally described in legislation as being “kept by” Companies House (we appreciate that “kept by” appears in schedule 1 paragraph 3 of the 2020 Regulations but this appears to be an outlier).
7. Regulation 31(7A) (inserted by regulation 28(f) of the instrument) creates an offence of failure by the scheme administrator to comply with a request for payment by SEPA of enforcement costs under regulation 30A. Under regulation 30A, the payment is to be made by such means or in such manner and at such intervals as are agreed with the scheme administrator. Given that it is relatively unusual that the person whose failure to comply would constitute an offence has the power to agree the terms which require to be complied with, could more information be provided in relation to how the reaching of agreement is to be governed? For example is it anticipated that the means/manner/intervals will be set out in the operational plan (for which there are deadlines and controls in the Order), and if so, does the Scottish Government consider that the instrument (or the Order) should stipulate this?
8. Regulation 28(e) of the instrument omits the offences in paragraphs (5) and (6) of regulation 31. Should it also omit the offence in paragraph (5A) (inserted by SSI 2023/210)? Paragraph (5A) relates to obligations in schedule 5, which this instrument omits.
9. The instrument does not appear to amend regulation 31(13) of the 2020 Regulation to remove reference to the offence under regulation 15. Regulation 15 of the 2020 Regulations is omitted by regulation 14 of the instrument.
10. In new schedule 1C (schedule 3 of the instrument), should paragraph 8 include “size” between “layout” and “design”, in line with new regulation 22(b) (inserted by regulation 21)?
11. Please advise whether any corrective action is proposed, and if so, what action and when.”

**On 13 May 2025 the Scottish Government responded:**

1. Question 2 in relation to the deposit is answered in the Scottish Government’s response to the Order.
2. The Scottish Government acknowledges that these definitions should have been inserted in alphabetical order.

3. There is no error in the wording in the new regulation 16A(3). Retailers and takeback service providers will have repaid deposits to consumers from whom they collect scheme packaging and the wording in paragraphs 2(a) and (4) is different to ensure that retailers and takeback service providers are reimbursed for what they have repaid to consumers for each return of scheme packaging. Hospitality retailers will not repay any deposits to consumers. They will, however, have paid deposits to wholesalers or producers when they purchased scheme articles for consumption by consumers on their premises; hospitality retailers are therefore to be paid the amounts that they themselves have paid out as deposits for purchase of scheme articles, and that accounts for the different wording.
4. The Scottish Government confirms that this is an oversight, but does not consider this substantively affects the operation of regulation 20 (as amended).
5. The Scottish Government agrees that the references to regulation 20ZA in regulations 20ZB and 20ZC of the 2020 Regulations (as inserted by regulation 18 of the instrument) are incorrect. They should in fact be references to regulation 22(a) or (b) and could have been better inserted after regulation 24.
6. The Scottish Government considers that the drafting is acceptable. As noted in the question, it is consistent with existing wording in paragraph 3 of schedule 1 of the 2020 Regulations.
7. The means, manner and intervals of payments of enforcement costs by the scheme administrator to SEPA will be a matter to be agreed between those two bodies. The Scottish Government expects that this will be a matter to be included in the operational plan which is to be approved by SEPA, although that will ultimately be a matter for SEPA to determine. While the Scottish Government accepts that the wording of the provision may be unusual, it is the policy intention that the deposit and return scheme is run by industry through the body that industry has set up as the scheme administrator. Given that it will control the finances of the scheme it also has to pay the enforcement costs, how it does that is not a matter which the Scottish Government would want to stipulate in the regulations since that will be part of the operational matters. Under the draft Deposit and Return Scheme for Scotland (Designation of Scheme Administrator) Order 2025, the scheme administrator is able to choose between several funding mechanisms to meet SEPA's costs (such as unredeemed deposits or producer registration fees).
8. The Scottish Government agrees that paragraph (5A) (inserted by SSI 2023/210) should have been omitted given that it relates to obligations in schedule 5 which is also being revoked by this instrument. However, it is not considered that this error substantively affects the operation of the offences provisions as there is no obligation to enforce.

9. The Scottish Government agrees that regulation 31(13) of the 2020 Regulations should have been omitted, given that regulation 15 of the 2020 Regulations is revoked by this instrument. However, it is not considered that this error substantively affects the operation of the offences provisions as there is no obligation to enforce.
10. The Scottish Government agrees that the word “size” should have been included in paragraph 8 of the new schedule 1C (schedule 3 of the instrument) between “layout” and “design”, in line with new regulation 22(b) of the 2020 Regulations (as inserted by regulation 21 of this instrument).
11. The Scottish Government will take corrective action in relation to the matters raised in questions 2, 4, 5, 8, 9 and 10 in due course. Given that the errors identified are in provisions of the instrument which will generally not be operational until after the scheme is launched on 1 October 2027 (apart from the error in new regulation 20ZB and paragraph 8 of the related new schedule 1C), the Scottish Government does not consider that it is necessary to remedy these errors immediately, but will do so at a convenient opportunity. In relation to regulation 20ZB (and the related schedule 1C), it is not expected that the scheme administrator will be in a position to receive any such applications for a return point exemption until well into 2026.

## Deposit and Return Scheme for Scotland (Designation of Scheme Administrator) Order 2025 (SSI 2025/Draft)

On 9 May 2025 the Committee asked the Scottish Government:

“In the questions below:

- “the Amendment Regulations” means the draft Deposit and Return Scheme for Scotland Amendment Regulations 2025 which were laid at the same time as this Order.
- “the 2020 Regulations” means the Deposit and Return Scheme for Scotland Regulations 2020 (SSI 2020/154).
- “the Act” means the Climate Change (Scotland) Act 2009.

### Questions

1. The Order cites, as its enabling powers, sections 85 and 96(2) of the Act. Does it rely also on the power in section 84(1) of the Act, given that the Order contains types of provision expressly mentioned in the Act as being provision that may be made under a scheme under section 84(1)? Examples are providing for a scheme administrator to carry out the functions listed in section 84(5), and provision about deposits (section 84(7)(c)).
2. The 2020 Regulations, which were subject to a super-affirmative procedure, fixed the amount of the deposit (at 20 pence). Under the Amendment Regulations and the Order, the amount of the deposit is instead to be determined by the scheme administrator. The amount of the deposit will therefore be set by a private company rather than in legislation subject to parliamentary procedure.

We appreciate that section 84 of the Act does not explicitly require the amount of the deposit to be set in regulations, but it does provide that “regulations may in particular include provision about... (c) the deposits to be included in the price”. During parliamentary consideration of the provision that became section 84, the Scottish Government stated in the [supplementary Delegated Powers Memorandum](#) that this section “allows [among other things,] the amount of any deposit, to be defined in regulations” (paragraph 140).

Against this background, could detail please be provided of (i) the reasons for the Scottish Government’s decision that the amount should not now be set out in legislation and that the power to set the amount should instead be delegated to the scheme administrator, and (ii) whether the Scottish Government considers that this is consistent with how Parliament expected that this would be done at the time that the delegated power was conferred?

3. Should the reference to “scheme producer” be:
  - (1) to the defined term “registered producer” in:
    - article 24(5)(b)

- article 25(7), opening words
- article 24(7)(a)
- article 25(3)?

(2) to “producer” in article 24(2)(a)?

4. Should articles 24(4) and 30(5) specify to whom the written notice of cancellation must be given, as is done in the opening words of article 28(2) (among others)?
5. In article 29(1)(b), should “size” be included between “layout” and “design” as a ground for an exemption, to match regulation 22(b) of the 2020 Regulations (as substituted by regulation 21 of Amendment Regulations), or should “size” be omitted from regulation 22(b)?
6. The formulation in articles 31(1) and 34(1) of “whether” and then “otherwise” appears unusual:

- “(1) The scheme administrator must...
- (a) decide whether to grant the application, or
  - (b) otherwise, refuse it”

Could this provision be expressed more clearly (for example “[decide whether to] grant or refuse the application”)?

7. (1) It appears that article 31(9)(b) is intended to provide that the scheme administrator may cancel a registration if it appears that the information provided in the application, on the basis of which the registration was granted, is no longer correct in a material respect. If so, could this provision be clearer? Article 31(9)(b) refers to the information provided in accordance [with] regulation 25(8)(b) of the 2020 Regulations, but this is the obligation to notify changes rather than the obligation to provide the initial information (the latter being in regulations 25(2)(b) and (c), with reference to schedule 4). It is noted that failure to comply with the obligation to notify material changes (regulation 25(8)(b)) would in any event be grounds for cancellation under article 31(9)(a).
- (2) The same issue arises in the reference in article 34(10)(b) to regulation 21(6).
8. In article 31(13)(c) is “a right” (or similar) missing in the phrase “the person has under article 20 to ask”?
9. Some terms that are defined in the Amendment Regulations are used in the Order but not defined there, such as “producer”, “return point exemption”, “sum[s] equal to the deposit” and “voluntary return point”. Does the Scottish Government consider that it would be helpful to the reader to define these in the Order or to include a general adoption of / signposting to the definitions in the Amendment Regulations?

10. Please advise whether any corrective action is proposed, and if so, what action and when.”

**On 16 May 2025 the Scottish Government responded:**

1. The Order relies only on the enabling powers in sections 85 and 96(2) of the Climate Change (Scotland) Act 2009. It does not rely on the power in section 84(1) since it provides Scottish Ministers with a power to establish deposit and return schemes by regulations and cannot therefore be used to include provisions in the Order. The Scottish Government considers that the matters included in the Amendment Regulations are covered by the enabling power in section 84(1) and that the matters included in the Order are covered by the enabling power in section 85. We did not consider that there were exceptional circumstances to justify combining the Amendment Regulations and the Order and deviating from the usual practice of keeping different forms of instrument separate.
2. As the Committee notes in the question, the enabling powers for deposit and return schemes do not explicitly require the amount of the deposit to be set in regulations. As also noted in the question, the supplementary Delegated Powers Memorandum states that section 84(1) *allows* among other things the deposit to be defined in regulations, but the Memorandum did not state that the deposit would be set in regulations. The supplementary Delegated Powers Memorandum goes on in paragraph 142 to state *“The section would permit a range of schemes to be developed, within that basic structure. At its simplest a scheme could merely require Scottish producers to establish their own deposit and return schemes.”* And in paragraph 146 it states *“The level of detail required to establish properly functioning schemes is likely to be best left to subordinate legislation.”*

The Scottish Government acknowledges that the 2020 Regulations, which were as stated in the question subject to a super-affirmative procedure, set the deposit. That was the preferred policy of the Scottish Government when the 2020 Regulations were made. The Committee will be aware that subsequently the United Kingdom Internal Market Act 2020 was passed by the UK Parliament which then had an impact on the operation of the 2020 Regulations. In its statement on 27 May 2023 on the Scottish Deposit Return Scheme and the Internal Market Act [Policy statement: Scottish Deposit Return Scheme - UK internal market exclusion - GOV.UK](#) the UK Government made it clear that when schemes across the UK launch, there needs to be maximum alignment to ensure they operate seamlessly for businesses and consumers across the UK. Following that statement the Scottish Government worked with other nations in the UK and a joint policy position was published on 25 April 2024 [Deposit Return Scheme for drinks containers: joint policy statement - GOV.UK](#). That statement makes clear that it is agreed that there should be an aligned deposit level across the UK to be set by the scheme administrators who are required to work together on the deposit level. Giving the scheme administrator powers to decide the appropriate deposit level provides industry

with control over the key lever to drive returns and manage revenue via unredeemed deposits, which also future proofs the scheme. It will allow the deposit to be set and changed using the most up to date information, and allow scheme administrators to be able to work together and make changes simultaneously in Scotland, England and Northern Ireland. In determining the deposit level, the scheme administrator must have regard to a variety of factors, including impacts on consumers and on relevant businesses; and it must consult before setting the deposit. In addition, it must inform the Scottish Ministers of the methodology, data and evidence relied on to calculate the deposit, if requested to do so by Scottish Ministers.

The Scottish Government has had to accept this change (and other changes) to its original policy position due to the UK Internal Market Act 2020 given that no exclusion from that Act is in place. Given the wide powers in sections 84 and 85 of the 2009 Act, the varied ways in which deposit and return schemes might be operated and the wording in paragraph 146 of the supplementary Delegated Powers Memorandum, we do not consider that the Parliament would necessarily have expected the deposit to be set in regulations. At the time that the powers were conferred it would seem unrealistic that there would have been expectations about the detail of how the deposit was to be set.

3. The Scottish Government agrees that the references in article 24(7)(opening words and sub-paragraph (a), and in article 25(3) should be to “registered producer” rather than “scheme producer”. ; the Scottish Government also agrees that the reference in article 24(2)(a) should be to “producer” rather than “scheme producer”. In article 24(5)(b) the reference to “scheme producer” is also incorrect, but it should not be a reference to “registered producer”, but rather to “producer”.
4. The Scottish Government considers that it is clear from the context of the provisions that the notice of cancellation would require to be given to the registered producer under article 24(4) and that the revocation of an exemption with would require to be given to the groceries retailer under article 30(5).
5. That Scottish Government agrees that the word “size” has been omitted in error in in article 29(1)(b) and that it should be included between “layout” and “design” as a ground for an exemption, to match regulation 22(b) of the 2020 Regulations.
6. The Scottish Government agrees that this provision could have been formulated differently, but considers that it is clear that the scheme administrator can either grant an application or refuse it.
7. The Scottish Government agrees that the reference in article 31(9)(b) (and equally the reference in article 34(10)(b)) could be clearer; it is misleading to refer to the requirement in the regulations to notify material changes to the scheme administrator. The intention of the provision is to ensure that the scheme administrator can cancel the registration if there has been a material



change in the registration information which the scheme administrator considers is sufficiently significant to lead to cancellation of the registration.

8. The Scottish Government agrees that the words “a right” are missing in article 31(13)(c).
9. The Scottish Government does not consider that it would have been helpful to the reader to include some kind of general adoption of / signposting to the definitions in the Amendment Regulations given that not all of the relevant terms are defined in the Amendment Regulations. Given the inter-relationship of the Order and the 2020 Regulations, there are many terms used in both. It was considered more helpful to set out each definition in the Order and make reference to its definition in the 2020 Regulations, where applicable. There is no definition of either ‘return point exemption’, and “voluntary return point” in the 2020 Regulations; it is also not considered necessary in the Order since the terms are only used in the context of the registration provisions for each. In relation to the phrase “sum[s] equal to the deposit”, it is used only in article 19 of the Order in the context of allowing payments to reimburse any other UK scheme administrator in respect of scheme packaging returned through any other deposit and return scheme. That is for the scheme administrators to agree among themselves, unlike the reimbursement of deposits to consumers or retailers under the 2020 Regulations. The Scottish Government agrees that it would have been helpful to include a definition of ‘producer’ in the Order.
10. The Scottish Government will take corrective action in relation to the matters raised in questions 3, 5, 7, 8 and 9 in due course. Given that the errors identified are in provisions of the Order which will not be applied in practice by the scheme administrator until at least after the scheme administrator has an operational plan in place in by March 2026 and is exercising its functions to register producers etc, the Scottish Government does not consider that it is necessary to remedy these errors immediately, but will do so at a convenient opportunity.

## **Environmental Regulation (Enforcement Measures) (Scotland) Amendment Order 2025 (SSI 2025/Draft)**

### **On 8 May 2025 the Committee asked the Scottish Government:**

We note that the footnote referencing the SSI number for the principal regulations has been included in the citation provision. In the body of regulation 2, there is a typo in the title of principal regulations which refers to the “Environment” Regulation (Enforcement Measures) (Scotland) Order 2015, and there is no corresponding footnote.

Whilst we appreciate that the Scottish Government’s view is likely to be that this does not invalidate the provision, it would be helpful to know whether it is something the Scottish Government considers should be corrected.

### **On 13 May 2025 the Scottish Government responded:**

Thank you for pointing out the misplaced footnote and typographical error in the Environmental Regulation (Enforcement Measures) (Scotland) Amendment Order 2025.

As referred to in the question, the Scottish Government is of the view that neither of these errors has the effect of invalidating the provision given that footnotes are not operative and have no legal force, and that the typing error is minor and obvious given that the correct title to the SSI is provided in the heading to regulation 2 of the instrument.

It is therefore is our intention to correct these errors in the signing version of this instrument, assuming that it is approved of by the Scottish Parliament, by repositioning the footnote to its correct location in regulation 2(1) and substituting “Environmental” for “Environment” in the reference to the instrument to be amended by this instrument.

## **Restitution Fund (Scotland) Order 2025 (SSI 2025/Draft)**

### **On 8 May 2025 the Committee's legal advisers asked:**

1. We note that the previous Committee considered the Restitution Fund (Scotland) Order 2021 on 19 January 2021 and that the 2021 Order delegated the establishment, maintenance, and administration of the Fund to the Scottish Police Benevolent Fund. We understand from the Policy Note to this instrument that the Scottish Police Benevolent Fund withdrew as the operator of the Fund on 30 June 2021. Please could you explain why legislation to revoke the 2021 Order is only being brought forward now?

2. The Policy Note suggests that funds have continued to be collected but no payments have been made out of the Fund during the period 30 June 2021 until

now, is that correct? It would also be helpful for the Committee's understanding of this instrument if you could provide further information as to how the Fund has been operated during this period.

**On 13 May 2025, the Scottish Government replied:**

As noted, the Restitution Fund (Scotland) Order 2021 came into force on 10 February 2021, delegating the establishment, maintenance, and administration of the Fund to the Scottish Police Benevolent Fund ("SPBF"). On 30 June 2021, the SPBF wrote to the former Cabinet Secretary for Justice and Veterans Keith Brown, to inform him of their decision to withdraw as operators of the Fund.

On 10 August 2021, the former Cabinet Secretary wrote to the Criminal Justice Committee to inform them of the withdrawal of the SPBF as the Fund operator. Further, the letter confirmed that while Restitution Orders would remain available to the courts, no money would be paid out of the Fund until such time as an alternative operator had been identified.

Thereafter, discussions with the Scottish Police Federation, exploring the possibility of them becoming operator, took place until February 2024, at which time it was agreed that while there were good reasons to support them stepping into that role, they did not feel it was in the end appropriate for them to do so. On 15 April 2024, the current Cabinet Secretary for Justice and Home Affairs Angela Constance agreed that the Scottish Ministers should be the operator of the Fund going forward. Thereafter work was undertaken to identify a suitable time for laying the draft Order, taking into account time for drafting and Parliamentary scrutiny.

The Cabinet Secretary subsequently wrote to the Committee on 24 February 2025, confirming the intention for the Scottish Ministers to operate the Fund, and the timescales for bringing forward an instrument to make the necessary legislative changes. A letter was also sent to the Restitution Fund Working Group, a short life working group that was established to set up the foundations of the Fund, to provide them with an update in that regard.

The former Cabinet Secretary for Justice and Veterans confirmed that no money would be paid out of the Fund until such time as an appropriate alternative operator had been appointed. To date, the Fund has been dormant with no payments being made from it and no outlays incurred in administering it, while allowing the funds to accumulate (recognising that the monies involved are still relatively small). Following commencement of the Order, officials will publish information regarding the administration and maintenance of the Fund. This will provide opportunity to consider how much money should be accumulated in the Fund before opening up for applications, and the criteria for such applications.

**Public Service Vehicles (Registration of Local Services)  
(Local Services Franchises Transitional Provisions)  
(Scotland) Regulations 2025 (SSI 2025/137)**

**On 6 May 2025 the Committee's legal advisers asked:**

In regulation 7(1), should the reference to “paragraphs (2) to (4)” be a reference to “paragraphs (2) and (3)” or is there a paragraph (4) missing from regulation 7?

Is any corrective action proposed?

I should be grateful if you would e-mail your response to me and the copy recipients by close on Tuesday 13 May.

**On 13 May 2025 the Scottish Government responded:**

Yes, the reference to “paragraphs (2) to (4)” in regulation 7(1) should be a reference to “paragraphs (2) and (3)”. Thank you for highlighting this error.

The Scottish Government is of the view that the error is minor and does not have any substantive impact on the operation of the regulations. Accordingly, corrective action is proposed by way of a correction slip.